

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

112165

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

~~No. 12,165~~

MIRIAM H. TRIVANOVITCH, APPELLANT

v.

136

OVETA CULP HOBBY, SECRETARY, DEPARTMENT OF HEALTH,
EDUCATION AND WELFARE, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

In the opinion of Appellee, the following questions are presented:

1. In applying the law of Massachusetts as to the devolution of intestate personal property, was appellee estopped from denying appellant's claim on the grounds that the wage-earner's divorce from his first wife was invalid and his subsequent marriage to appellant was bigamous and void?

2. Under Massachusetts law would appellant be deemed the widow of Vaso Trivanovitch for purpose of devolution of intestate personal property?

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,105

MIRIAM H. TRIVANOVITCH, APPELLANT

v.

OVETA CULP HOBBY, SECRETARY, DEPARTMENT OF HEALTH,
EDUCATION AND WELFARE, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant married one Vaso Trivanovitch on April 8, 1947 (J. A. 8). He died on November 5, 1949 (J. A. 4-b). At the time of his death, he was a "fully insured individual" for purposes of Old-Age and Survivors Insurance Benefits under the Social Security Act. Vaso Trivanovitch previously had married one Constance Burr in 1927 (J. A. 1(a)). They procured a Mexican "mail-order" divorce in 1937 (J. A. 1a, 4, 6).

Appellant claimed widow's insurance benefits and child's insurance benefits under Section 202, *et seq.* of the Social Security Act as amended, 42 U. S. C. Sec. 402, *et seq.* (J. A. 1). These claims were denied by appellee on May 6, 1953 (J. A. 7). Appellant filed a "Complaint to Review Final

Decision of Secretary of Health, Welfare, and Education'' [sic] on June 9, 1953 (J. A. 8). There being no dispute as to any material fact, cross-motions for summary judgment were filed by appellant (plaintiff below) and appellee (defendant below). (J. A. 10, 11). On February 17, 1954, the United States District Court for the District of Columbia (Judge Curran) denied appellant's motion for summary judgment and granted appellee's motion for summary judgment (J. A. 12). This is an appeal from that ruling (J. A. 13).

STATUTE INVOLVED

Title 42 U. S. C. § 416(h) (1) provides:

In determining whether an applicant is the wife, husband, widow, widower, child, or parent of a fully insured or currently insured individual for purposes of this subchapter, the Administrator shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the state in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the state in which he was domiciled at the time of his death, or if such insured individual is or was not so domiciled in any state, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a wife, husband, widow, widower, child, or parent shall be deemed such.

SUMMARY OF ARGUMENT

Appellee was not a party to the Mexican mail-order divorce procured by Vaso Trivanovitch and, hence, is not estopped to deny the validity of that divorce. Likewise, appellee cannot be said to be standing in the shoes of Constance Burr in determining the status of appellant.

Under Massachusetts law the estoppel claimed here by appellant only operates against a party with "unclean hands" and not against any others. Since, under Massachusetts law, a bigamous marriage is void during the life-

time of the first spouse the appellant would not prevail in any contest between her and anyone other than the first wife over the devolution of intestate personal property.

ARGUMENT

I

Appellee Is Not Estopped to Question the Validity of Appellant's "Marriage" to the Deceased Wage Earner

As between appellant and the first wife (Constance Burr) of the deceased wage earner it is clear that the former might be deemed the "widow" for purposes of devolution of intestate personal property under Massachusetts law. But where, as here, the first wife is not a party to the proceeding, appellant can not qualify as the widow of the deceased wage earner. The distinction is implicit in the numerous cases cited by appellant in her brief. Before going into the several cases cited by appellant it might be well to consider the position of the appellee.

Fundamentally, the parties are in agreement that appellee is but a passive stakeholder in this case. As such, she must apply the law to the facts as presented. Her decision is final and not reviewable in the courts so long as it is supported by substantial evidence. *Thompson v. Social Security Board*, 81 U. S. App. D. C. 27, 154 F. 2d 204 (1946). Even where the evidence is undisputed, the Courts should not substitute their judgment for that of appellee. As stated in *Gray v. Powell*, 314 U. S. 402, 412 (1941):

"* * * Although we have here no dispute as to the evidentiary facts, that does not permit a court to substitute its judgment for that of the Director * * * It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action."

Here, appellee has based her decision on the grounds that the cases relied on by appellant are inapplicable because they involved contests between parties claiming as widows

and the application of the doctrine of "unclean hands." Certainly it cannot be contended that appellee must relegate herself to the position of a claimant with "unclean hands" in applying the law of Massachusetts to this case. No, appellee need only determine whether or not the appellant is the "widow"—not for *any* purpose, but only "for devolution of intestate personal property." In reaching her decision appellee is not precluded by any rule of law nor grain of reason from inquiring into the validity of appellant's alleged marriage.¹ Appellee knows of no case in Massachusetts where the court has decreed a bigamous wife to be the "widow" without application of the "unclean hands" doctrine. On the other hand, there is authority to the effect that where the "unclean hands" doctrine does not apply a bigamous wife does not take intestate personalty under Massachusetts law, despite the innocence of the party so claiming.² In the face of these cases, then, it cannot be said that the appellee was "estopped" under Massachusetts law from refusing appellant's claim.

II

Under Massachusetts Law, Appellant Is Not the Widow of the Deceased Wage Earner for Purposes of Devolution of Intestate Personal Property.

A review of the cases cited by appellant in support of her position will reveal that the law of Massachusetts, far from being an application of strict estoppel, is nothing more than the doctrine of "unclean hands."

In the case of *Loud v. Loud*, 129 Mass. 14 (1880), the contest did not involve widow's rights, but nevertheless, related to the question of the validity of a second marriage in the face of an invalid divorce. Here the Court said (129 Mass. at 18):

¹ *Petition of Taffel* (D.C., S.D., N.Y., 1941), 49 F. Supp. 109, 111. Discussed *infra*.

² *Corkum v. Clark*, 263 Mass. 378, 161 N.E. 912 (1928); *Old Colony Trust Co. v. Porter*, 324 Mass. 581, 88 N.E. 2d 344 (1949); *Chapman v. Chapman*, 224 Mass. 427, 113 N.E. 359 (1916).

“* * * that the first wife not only appeared in the suit brought by the husband, but that she afterwards executed a release, reciting the divorce decree therein obtained by him, and for a pecuniary consideration discharging all her claims upon him or his estate. Having done this, she cannot treat his subsequent marriage and cohabitation with another woman as a violation of his marital obligations to herself. The defense is allowed, *not upon the ground of a strict estoppel, but because her own conduct amounts to connivance at, or acquiescence in, his subsequent marriage.*” (Emphasis added).

Chief Justice Holmes, speaking for the Supreme Judicial Court of Massachusetts referred to the *Loud* case, *supra*, in *Andrews v. Andrews*, 176 Mass. 92 at 96, 57 N. E. 333 (1900), as follows:

“It is settled that there is no estoppel even as against the party instituting the proceedings. (*Smith v. Smith*, 13 Gray 209, 210). If the appellant’s conduct amounted to connivance, as found, so that she could not have maintained a libel for adultery on the ground of the second marriage, that does not go far enough to constitute an estoppel. (*Loud v. Loud*, 129 Mass. 14).”

Again, the “unclean hands” doctrine appears in the case of *Ewald v. Ewald*, 219 Mass. 111, 113, 106 N. E. 567 (1914):

“She not only comes into court with unclean hands, but she makes her wrongful conduct the very ground of her application for relief from its consequences. The Court will leave her in the position in which she has chosen to place herself.”

Incidentally, the *Ewald* case, *supra*, concerned a libel to annul a fraudulent marriage.

Similarly, in the case of *Langwald v. Langwald*, 234 Mass. 269, 125 N. E. 566 (1920), the Court denied a libel for divorce because the wife connived in obtaining a fraudulent divorce in Wyoming and then sought to obtain a Massachu-

setts divorce on the grounds of adultery after her husband had remarried. This case also refers to *Loud v. Loud, supra*.

In a contest between two women, each claiming to be the lawful widow of one Hiram Chapman (*Chapman v. Chapman*, 224 Mass. 427, 113 N. E. 359 (1916)), the Court again negated the estoppel theory, thusly at 433:

“The defense is allowed, not upon the ground of a strict estoppel, but because her own conduct (speaking of the first wife) amounts to a connivance at, or acquiescence in, his subsequent marriage.”

and at 434:

“It is not necessary to determine to what extent, if at all, these proceedings in Nebraska and North Dakota would affect the rights of other persons not parties to them. We go no further than to say that under these circumstances the appellee cannot be heard to assert that she is the widow of Hiram. This is not on the ground of strict estoppel, but because she has connived at another marriage by him and has entered into a marriage herself which would be a crime without the severance of the marriage with Hiram.”

The *Chapman* case, *supra*, and the *Ewald* case, *supra*, were the basis for the court's ruling in *Payzant v. Payzant*, 269 Mass. 70, 72, 168 N. E. 168 (1929):

“The wrongful conduct of the petitioner is the ground for the relief he seeks. He is in no position to invoke the aid of a court of justice. (*Ewald v. Ewald*, 219 Mass. 111; *Chapman v. Chapman*, 224 Mass. 427).”

And again, the Court relied on the *Ewald* case, *supra*, in *Belcher v. Belcher*, 324 Mass. 757, 88 N. E. 2d 344 (1949):

“The case is governed by *Ewald v. Ewald*, 219 Mass. 111, where, as here, libellant made his own wrongful conduct the ground of an application for relief from its consequences.”

This case, like the *Ewald* case, *supra*, was for annulment of a marriage.

In a case holding that the *second wife* was estopped to deny the validity of her husband's previous divorce, the Court said in *Parmelee v. Hutchins*, 238 Mass. 561, 564, 131 N. E. 443 (1921):

“ * * * a remarriage with knowledge of the facts estops the party entering into it from denying the validity of the previous divorce.”

Obviously, this is no more than an application of the “clean hands” doctrine, which, of course, when applicable, amounts to a bar against the party with “unclean hands” in the nature of an estoppel.

It is interesting that appellant should cite *Bergeron v. Bergeron*, 287 Mass. 524, 192 N. E. 86 (1934), which was a suit involving custody of a child and one in which the Massachusetts Supreme Judicial Court ruled that a Mexican divorce like the one in the instant case was invalid and that the parties to that divorce are still validly married. In that case there was no “estoppel” even by way of an application of the “unclean hands” doctrine. The Court, in permitting the husband to attack the validity of the foreign decree said (287 Mass. at 528):

“No conduct of the petitioner such as appearance or collusion in the divorce proceeding or action on his part conclusively recognizing its validity (citations) bars him from raising the question of jurisdiction in the case at bar.”

The same result was reached in *Old Colony Trust Co. v. Porter*, 324 Mass. 581, 88 N. E. 2d 344 (1949), where the case is distinguished from the *Loud*, *Chapman* and *Langwald* cases, *supra*. Here, the Court relied on *Adams v. Adams*, 154 Mass. 290, (1891), where the Court stated: (p. 293)

“We should agree with the English decisions so far as this, that the fact that a marriage has taken place on

the faith of a previous divorce does not preclude inquiry by the courts of another state into the capacity of the divorced party, and thus into the validity of the marriage if the divorce is one which would be decreed void if it were directly in issue."

Appellant is to be commended for her candid treatment of the subject by citing the case of *Corkum v. Clark*, 263 Mass. 378, 161 N. E. 912 (1928). It would appear from the quotations from appellant's cases as set forth hereinabove that the Massachusetts court might well have ruled differently in the *Corkum* case had the first wife come into court with unclean hands. The importance of the case lies, of course, not in our speculations as to what the court might have done under different circumstances, but rather, in what the court actually held: That the first wife was the lawful widow because the divorce between her and the deceased was a nullity.

Finally, we come to the case of *United States v. 2191 Acres of Land*, 50 F. Supp. 797 (D. C. Mass. 1943), which is no more than a reiteration of the principles set forth in *Loud v. Loud*, *supra*. Here, as in the *Loud* case, *supra*, the Court speaks of "pecuniary" advantage, "connivance", subjecting "herself to the jurisdiction of the foreign court." In view of these elements, the Court holds (50 F. Supp. at 798):

" . . . that party will not be heard for her own advantage to question the jurisdiction of the foreign court or to attack the validity of the divorce decreed by that court."

It is respectfully submitted that the case at bar comes a great deal closer to the *Corkum v. Clark* case, *supra*, than the other cases cited by appellant.

Even if the law of Massachusetts be construed in the view most favorable to the appellant's position, no estoppel would operate as against the appellant herein. This specific point was ably decided in *Petition of Taffel*, 49 F. Supp. 109 (D. C. S. D. N. Y. 1941) where the court denied a

woman petitioner naturalization as the alleged "wife" of an American citizen whom she "married" after he had obtained a Mexican mail-order divorce from his first wife. The Federal Court, after referring to "certain cases where the New York courts, while conceding the invalidity of the Mexican or foreign divorce decree, have nevertheless held, that by invoking the jurisdiction of the foreign court, the parties could not be heard to attack the decree of that court," said (49 F. Supp. at 111):

"These cases do not establish the validity of the foreign divorce decree, but merely hold that the parties in a contest between themselves, are, by their prior conduct, estopped to challenge the validity of the decree, and the Federal Government, or the State, not being a party to the collusive arrangement of the litigants is not estopped to assert the invalidity of the divorce decree."

It is significant that the court uses the word "collusive" as the test for the application of an estoppel.³ That the courts of Massachusetts would apply the same rule as applied in New York is implicit in the language of the court in the *Old Colony Trust Co.* case, *supra* (324 Mass. at 587):

"* * * Neither Old Colony Trust Company, which is the present petitioner, nor the persons in whose behalf it is acting were in any sense parties to the divorce proceedings so as to become bound thereby, or in privity with the parties. They were not entitled to notice of that proceeding and presumably had none. They could not have appealed from the decree. They took no part whatever in the case. They were in no way concerned in the result of it at the time and would never have become concerned, if Mrs. Simonds had not afterwards contracted her second marriage. They now find that their property interests under the paper offered for probate as the will of Virginia Fildes Simonds may be destroyed as a result of the decree, since if the decree is

³ See *Bergeron v. Bergeron*, *supra*.

binding upon them Mrs. Simond's marriage with Porter will be held to have revoked any prior will made by her."

Still another test as to the validity of the marriage between Vaso Trivanovitch and the appellant would depend on the policy embodied in the case law of Massachusetts to the effect that the validity of a marriage depends upon the question whether it was valid where it was contracted. *Commonwealth v. Lane*, 113 Mass. 458, 18 Am. Rep. 509 (1873). The marriage here in question was contracted in the District of Columbia and was void by virtue of Title 30, Section 301 of the D. C. Code, (1940 Ed.) which provides in part that the marriage of any persons, either of whom had been previously married and whose previous marriage had not been terminated by death or a decree of divorce, is void *ab initio*. Furthermore, it is well established in this jurisdiction that a Mexican mail-order divorce is totally null and void. *Anderson v. Anderson*, 84 U. S. App. D. C. 231, 172 F. 2d 280 (1949).

Assuming *arguendo*, that Vaso Trivanovitch married appellant in good faith, believing that his first marriage had been terminated by the Mexican divorce, the statutory law of Massachusetts would, nevertheless, preclude a finding that the second marriage was valid or that the appellant is his lawful widow. As the Court said in *Hopkins v. Hopkins*, 287 Mass. 542, 545, 192 N. E. 145, (1934):

"The underlying question to be decided relates to the matrimonial status of the intestate and Mary F. Sullivan. The determination of that question depends upon the interpretation of C. L. (Ter. Ed.) c. 207, § 6 (identical with R. L. c. 151, § 6, in force in 1905). It is in these words: 'If a person, during the lifetime of a husband or wife with whom the marriage is in force, enters into a subsequent marriage contract with due legal ceremony and the parties thereto live together thereafter as man and wife, and such subsequent marriage was entered into by one of the parties in good faith, in the full

belief that the former husband or wife was dead, that the former marriage had been annulled by a divorce, or without knowledge of such former marriage, they shall, *after the impediment to their marriage has been removed*, by the death or divorce of the other party to her former marriage, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been legally married *from and after the removal of such impediment*, and the issue of such subsequent marriage shall be considered as the legitimate issue of both parents.' '' (Emphasis added).

In other words, despite the innocence and good faith of the wage earner and the appellant in the case at bar, the law of Massachusetts precludes a finding that the parties were validly married unless and until the impediment to that marriage is removed. Since the court looked to the above-quoted statute in determining the status of a person claiming to be the widow of an intestate decedent in the *Hopkins* case, *supra*, reason dictates that we must look to the same statute in the case at bar. This statute requires more than innocence; more than good faith; more than continued cohabitation as man and wife; more than due legal ceremony. In order that the second marriage be recognized as valid the impediment must be removed. Then, all other conditions being met, the second marriage becomes valid—not retroactively, but from the time when the impediment is removed.

Consequently, the appellant cannot, by any stretch of the imagination, qualify as the widow of the deceased wage earner in the case at bar. It is significant that in this case the first wife could not claim the benefits here in question because she was not "living with" the wage earner at the time of his death.⁴ Hence she could not be a party to the present controversy and there is no occasion to apply any

⁴ Title 42 U.S.C., Sec. 402(e) requires, *inter alia*, that the widow be living with the insured wage earner at the time of his death in order to entitle her to widow's benefits under the Act.

special rules by way of "unclean hands" or otherwise in determining the status of the appellant.

CONCLUSION

Since appellant was never legally married to the deceased wage earner because of the invalidity of his divorce from his first wife, and since the first wife is not a party to the controversy, appellee correctly applied the law of Massachusetts in holding that appellant is not the "widow" of Vaso Trivanovitch.

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

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